In The

Supreme Court of the United States

October Term, 1980

No. 80-1491

TELTRONICS SERVICES, INC.,

Petitioner,

–against–

L.M. ERICSSON TELECOMMUNICATIONS, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Printinghouse Press – Bar Ass'n Steno Svc. (Appeals Section) 212-840-1891

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The Trustee submits this reply brief in response to arguments newly raised by Ericsson's Brief in Opposition.

I

Ericsson documents and Nordic testimony, now of record in the related bankruptcy court proceeding, demonstrate Ericsson's fraud.

It has been suggested by Ericsson (Br.2n) that we may have "misstated several facts in presenting the case to this Court." This suggestion concerns our statement that documents and testimony filed in a related bankruptcy court proceeding show the merits of Teltronics' antitrust claim (Pet. 13, 27). These were the documents of which Second Circuit refused to take judicial notice.*

We have reproduced three of them in the Appendix (A1-12).

The first is a file memorandum dated February 28, 1979 signed by two representatives of Price, Waterhouse & Co. (A1-2).

* There has been no discovery in the case.

The second is a memorandum dated March 6, 1979 to Ericsson's president, Malmstrom, from his assistant, Halvorsen (A3-5).

The third comprises excerpts from testimony before the Securities and Exchange Commission by Nordic's executive vice president, Radberg, concerning events in early 1979 (A6-12).

We believe that these documents speak for themselves and that they support the statements made in our presentation. There are additional Swedish language documents, obtained by the Trustee from the SEC, which we believe to provide further support. Again, we stress that Teltronics' allegations have never been refuted on their merits, and that the Second Circuit refused to consider these recently disclosed documents in passing upon the Trustee's request for equitable relief from strict res judicata principles.

II

The case deserves review in light of the divided opinion by this Court in Mercoid and its recent decision to review Moitie

Ericsson's analysis of this Court's decision in Mercoid Corp. v. Mid-Continent Invest. Co., 320 U.S. 661 (1944), does not square with the language of the opinion. In Mercoid, Justice Douglas dealt with Mid-Continent's res judicata defense as follows:

> "Respondents point out that Mercoid knew of Mid-Continent's actions and the license agreement prior to 1924 when the earlier suit involving the validity of the Cross patent (Smith v. Mid-Continent Invest.Co. (CCA 8th) 106 F.(2d) 622, supra) was instituted. They state, and the District Court found, that although Mercoid was not made a party to the earlier suit it provided the defense. The contention therefore is that the doctrine of res judicata binds Mercoid as respects issues which were actually litigated and all issues which might have been raised in that earlier suit. And it is pointed out that among the defenses which might have been interposed were those relating to the misuses of the patent and the violations of the anti-trust laws. It is argued, moreover, that although Minneapolis-Honeywell was

not a party to the earlier litigation, it is entitled to the benefit of the judgment since its title or claim derives from the patentee. We do not stop to examine the premises on which the argument is based; for though we assume that they are correct, it does not follow that the doctrine of res judicata forecloses the defense which is tendered.

"Respondents ask the equity court for an injunction against infringement by petitioner of the patent in question and for an accounting. Should such a decree be entered, the Court would be placing its imprimatur on a scheme which involves a misuse of the patent privilege and a violation of the anti-trust laws. It would aid in the consummation of a conspiracy to expand a patent beyond its legitimate scope. But patentees and licensees cannot secure aid from the court to bring such an event to pass, 'unless it is in accordance with policy to grant that help.' Beasley v. Texas & P.R. Co. 191 U.S. 492, 497, 48 L.ed. 274, 275, 24 S.Ct 164. And the determination of that policy is not 'at the mercy' of the parties (id. 191 U.S. p. 498, 48 L.ed. 276, 24 S.Ct. 164) nor dependent on the usual rules governing the settlement of private litigation. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' Virginian R. Co. v. System Federation, R.E.D.,

300 U.S. 515, 552, 81 L.ed. 789, 802, 57 S.Ct. 592." [id. 669-70]

Four of the justices dissented, in three separate dissenting opinions, all of which disagreed with Justice Douglas' view concerning the ascendency of public policy over res judicata in an antitrust action. The views ascribed by Ericsson to the majority (Br.6) appear to be those of the dissenting justices.

It seems clear to us that the Ninth Circuit in Moitie adopted the philosophy of the majority, while the Second Circuit in Teltronics in effect followed the view of the dissenters.

Ericsson's notion (Br.p.3) that Teltronics "involves an altogether ordinary res judicata ruling" is belied by the two published decisions of the district court, the three separate dissents in Mercoid, and this Court's grant of certiorari in Moitie.

CONCLUSION

The petition for certiorari should be granted.

Dated: New York, New York
March 6, 1981

Respectfully submitted,

Gabriel B. Schwartz

David I. Blejwas

Attorneys for Petitioner,
Jules J. Hessen, as
Trustee in Bankruptcy
of Teltronics Services, Inc.

A P P E N D I X

FEBRUARY 28, 1979
MEMORANDUM BY PRICE WATERHOUSE & CO.

"L.M. ERICSSON TELECOMMUNICATIONS
REVIEW OF TELTRONICS AUDITORS
WORKING PAPERS
MEMORANDUM TO FILES

On February 28, 1979 I spoke with L. Haber Mgr. of Blonder, Seymour & Shapss (BSS) to confirm my review of BSS's working papers as they relate to rental agreements of Teltronics that were circularized by BSS, for which L.M. Ericsson has a security interest. The review of the working papers was confirmed for March 5, 1979. During my discussion with L. Haber, I inquired as to when Teltronics would be issuing their December 31, 1978 annual accounts and what type of opinion they would be getting from BSS. L. Haber indicated that the annual accounts would be ready by March 31, 1979 (last day of filing SEC 10-K) and that as far as he could determine at this point Teltronics would be getting an unqualified opinion.

I further inquired of the status of Teltronics commitments for debt principal and interest repayment maturities as made known to me by L.M. Ericsson as well as Citibank. My understanding of Teltronics' debt maturities was explained to L. Haber as follows:

a) In the latter part of December 1978, LMU transferred substantially all amounts owed them from Teltronics on open accounts receivable to a $1,000,000 note which matures on March 31, 1979.

b) The principal payments due on Teltronic's loan with Citibank of $3.7 million ($300,000 due on October 31, 1978 and January 31, 1979) had been postponed (through a waiver of default issued by Citibank) to March 31, 1979.

c) The interest due on the loans with Nordic American of $4.5 million had also been deferred to March 31, 1979. In addition, the first principal payments on these loans were due March 31, 1979.

Mr. Haber's response to the above indicated that he had no knowledge of the $1,000,000 note and that an accounts receivable confirmation returned to him from LMU dated December 31, 1978 made no mention of the note.

In addition, it also appeared that he had no knowledge of the other debt commitments noted above, but, he felt that Teltronics would be able to arrange adequate financing from their banks or issue some sort of paper to meet all the commitments.

No other matters were discussed.

NOTE: I WAS PRESENT DURING FSR'S CONVERSATION WITH MR. HABER AND THE ABOVE MEMO ACCURATELY REFLECTS THE QUESTIONS AND COMMENTS THAT FSR MADE.

G.M. Recine

F.S. Risucci
Huntington Station,
New York
February 28, 1979"

MARCH 6, 1979 MEMORANDUM
BY RON HALVORSEN OF
L.M. ERICSSON TELECOMMUNICATIONS, INC.

"TO: Sigge Malmstrom

FROM: Ron Halvorsen

DATE: March 6, 1979

SUBJECT: Events of TSI Default

The following items occurred yesterday, March 5th:

1. Nordic sent Letter A, by messenger, to TSI advising them of the default and demanding payment of $4,945,360.63 in principal and interest.

2. LMU sent Letter B, by messenger, to TSI indicating that we have received Letter A and are declaring a default under the Security Agreement and demand three items from TSI as shown, including Letter C.

3. Letter D was also sent TSI to reinforce our claim of a default under the Security Agreement. It demands the same things as Letter B.

4. Nordic demanded payment of $4,945M from LMU by letter delivered to Don Costello at S&C.

5. A check for $4,945,360.63 was delivered to Nordic by Costello, and

Nordic assigned their rights under the Loan Agreements to LMU and endorsed the notes to LMU. Therefore, TSI now owes LMU the $4.95M, and LMU has all the rights of the Loan Agreement.

6. Letter E was sent to Manufacturers Hanover to claim our rights to the lockbox.

Events to occur today:

1. LMU has filed a lawsuit against TSI to recover the $4.9M. Also, we are filing a motion as part of the lawsuit for a pre-trial attachment. What we are asking a judge to do is seize the assets of TSI before the trial. The reason is to prevent TSI from selling the collateral. This should be granted before Friday. As part of this, we are also seeking an injunction prohibiting transfer of assets until the judge has ruled on the motion of pre-trial attachment.

2. The above injunction, if granted, would be served on all parties this afternoon.

3. Citibank will demand payment on their notes in a similar fashion as Nordic. This will occur this afternoon.

4. Letter F to the collateral base will be sent.

5. Commercial fraud suits will be brought against certain officers and directors once we know who commited the fraud.

6. LMU will issue a press release after receipt of the injunction.

R.E.H.
Ron Halvorsen

REH/cc
Encl."

EXCERPTS FROM TESTIMONY BY
LARS T. RADBERG BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
ON AUGUST 8, 1979

---

* * *

"LARS T. RADBERG
after having been first duly sworn, was examined by counsel and testified as follows:

* * *

Q. Sir, how are you presently employed?

A. I'm Executive Vice President of Nordic American Banking Corporation.

Q. How long have your held that position?

A. Since 1975.

* * *

Q. So, it was your understanding that Teltronics would make no further payments of interest until February 28th, 1979, is that correct?

A. That's correct.

Q. In that period, between November 30th, 1978 and February 28th, 1979, was Teltronics required to make any principal payments to Nordic American Bank?

A. No.

Q. So, it was your understanding that between those two dates, there would be no further payments of either principal of interest by Teltronics?

A. Right.

Q. During this entire period, did you have any discussions with any of the individuals or representatives of Teltronics?

A. I didn't, no.

* * *

Q. Was this letter - and I'll read it into the record at this time - "This is to confirm the interest payment due Nordic from Teltronics Services, Inc. on February 28th, 1979 can be charged to LMU's account it, for some reason, Teltronics is unable to make payment." It's dated January 26th, 1979; it's to you from Siggie (phonetic) Malmstrom --

A. Yes.

* * *

Q. Sir, did there ever come a time that LMU revoked this authorization?

A. Yes.

Q. And how did you ascertain that this revocation occurred?

A. I'm trying to remember the exact details.

Q. Well, can you tell me first when this occurred, sir?

A. I believe it was February 28th or March 1st - I can't tell you exactly to the day.

Q. Can you try to relate to me how iT occurred that this revocation [sic] was revoked?

A. They had deposited to the account two hundred and fifty thousand dollars to their account with us. I'm talking about L.M. Ericsson Telecommunications. They deposited two hundred and fifty thousand dollars to that account on February 28th. They called us up and told us they would do that and they did that. And then - let's see --

Q. Do you know who called you and told you this?

A. You mean the two hundred and fifty?

Q. Yes.

A. I believe it was Mr. Costello.

Q. Did you personally speak to him?

A. I spoke to him personally, yes. And I believe it must have been their lawyer who called, Mr. - well from Sullivan and Cromwell.

Q. Do you remember who that was?

A. Mr. Towne.

Q. This was also on February 28th, sir?

A. The 28th or maybe March 1st, I couldn't tell you. And he said, please do not debit the account for the interest. He explained that when making the guarantee in our favor, Telecommunications, they in their turn protected themselves with a security agreement with Teltronics and therefore the, in order to protect themselves, they would have to call on that - what do you call it? - they would have to call on that security agreement and a debiting of Telecommunications' account would not constitute a default from a legal point of view.

Q. This was Mr. Towne, you --

A. Uh, huh.

Q. And he was speaking to you, sir?

A. He was speaking to me.

Q. So that --

A. You know, we had the money there, but we didn't debit the account for the interest.

Q. You took what Mr. Towne was saying to you that they were revoking their authorization to debit their account, is that correct?

A. Yah, revoking. Yes, you can say that.

* * *

Q. Let me ask you one question. On February 28th, did anyone from Nordic call Teltronics to indicate to them that they had not paid or when the payment would be

coming? Was there any calls made directly to Teltronics?

A. I don't know. I didn't call.

Q. You did not.

A. No.

Q. Okay. Please continue.

A. Well, the, we, of course, discussed internally what should we do. They haven't paid. We had, as I told you before, I had spoken to Mr. Costello and he had arranged for the two hundred and fifty thousand deposit. We didn't debit the account because when double-checking the loan agreement and the what we call the general conditions, we found that they had two days of grace. I mean, that's incorporated in our general conditions for loans. So, we decided to wait and see what might happen prior to, I believe the two days of grace were up on a Friday afternoon. Let me see, the 28th - it must have been the second or something. I'd have to verify it.

* * *

Q. Okay. During that period between the 28th and March 2nd - and we'll clarify for the record whether in fact it was March 2nd - did you call any representatives of Teltronics regarding the failure to make payment on the 28th?

A. I didn't, no.

* * *

Q. Sir, there was a two day grace period.

A. Yes.

Q. During that period, did Nordic American Bank take any action on the loan on the outstanding loan? When I say action, in regard to Teltronics' loan?

A. Well, we - let's see. We had a meeting in my office with representatives of the guarantor and also our own lawyer.

Q. And can you tell me what was discussed, outside the presence of counsel? If anything?

A. Yah, we discussed, we determined that they hadn't paid and I explained that they had two days grace and we would have to wait and see what happened and I asked our counsel to stand by in case any action was needed, if any legal steps would had to have been taken to protect our interest.

Q. Subsequent to March 2nd, what occurred in regard to the failure of Teltronics to make their payment on the 28th?

A. Nothing happened really. As I believe, the first and the second were on a Thursday and a Friday. The following Monday, we decided to demand payment and accelerate the loans and that action was taken and the borrower was notified in accordance with the suggestions made by our counsel.

Q. They were notified that all payments were accelerated?

A. Yes.

Q. When did that occur, sir? Do you know the date?

A. The, this happened in the morning of the 5th - that was a Monday.

Q. Up until the 5th, March 5th, sir, had Teltronics been contacted in any way regarding their failure to pay? By Nordic American Bank?

A. Up until the fifth?

Q. Yes.

A. I don't know.

Q. You did not?

A. I didn't. I didn't.

Q. Did Mr. Culligan indicate to you that he had?

A. I don't think he said anything, no."